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In The Supreme Court of the United States

SHAFIQ RASUL, et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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STATEMENT OF INTEREST[1]

This case raises the question of whether the federal courts have jurisdiction to review *habeas corpus* petitions filed by "next friends" of persons detained by the United States at the United States Naval Base at Guantánamo Bay, Cuba ("Guantánamo"). *Amici curiae* are professors of legal history at law schools and universities in the United States and England with expertise in English legal history prior to 1789 and/or early American legal history. The professional interest of *amici curiae* legal historians is in ensuring that the Court is fully and accurately informed respecting the historical precedent, understandings, and evidence regarding the history of English law and the scope and availability of the writ of *habeas corpus* that, under this Court's precedents, are properly considered in evaluating the issues raised under the Suspension Clause of the United States Constitution and the statutory codification of the writ. The people whose lives and writings *amici curiae* study, including the generation that drafted this country's Constitution, were steeped in the common law tradition, including the principles governing the extension of English law to new territories in the British empire and the writ of *habeas corpus*, which they considered a great bulwark of personal freedom and check on arbitrary executive power. Unquestionably, the Framers, educated in English law, drew on this common law framework when they prohibited suspension of the writ. *Amici curiae* have no personal, financial, or other professional interest, and take no position respecting any other issues raised in the cases below, including the merits of the underlying claims for relief of each detainee or the proper venue or custodian for a *habeas* action.

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[1] *Amici* state that Jonathan L. Hafetz, Esq., an associate at the law firm of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., which is counsel to petitioners in the case at bar, is the author in part of the herein brief. *Amici* state that no person or entity other than *amici* and their counsel made any monetary contribution to its preparation. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Sup. Ct. R. 37.

SUMMARY OF ARGUMENT

Petitioners are "next friends" of Australian, British, and Kuwaiti citizens confined at Guantánamo who seek to test the lawfulness of that Executive Branch detention, including on the ground that the detainees have been wrongly classified as "enemy aliens." Each detainee was apparently captured by United States forces in Afghanistan or neighboring countries and has remained in custody for over two years. In their petitions for a writ of *habeas corpus*, the "next friends" asked a United States district court to exercise jurisdiction and determine the lawfulness of the detainees' confinement. The "next friends" asserted that the federal *habeas* statute and the Suspension Clause of the Constitution prohibit the denial of all *habeas corpus* review of the prisoners' detention at Guantánamo.

The government responded that the detainees may be held indefinitely by the Executive Branch, in territory long subject to the exclusive jurisdiction and control of the United States, without review of any claim by any court. The district court and the U.S. Court of Appeals for the District of Columbia Circuit agreed with the government and declined to exercise jurisdiction to inquire into the merits of the claims raised in the petitions. The Solicitor General contends that this conclusion is consistent with the federal *habeas corpus* statute and the Constitution, because (1) mid twentieth-century precedent "preclude[s] the availability of the Great Writ to aliens held abroad,"[2] and (2) these are "'enemy aliens' . . . seized in the course of active and ongoing hostilities against United States and coalition forces."[3] In effect, the government maintains that the Suspension Clause places no constraints whatsoever on creating a prison that is outside the law but inside territory over which the U.S. has long exercised complete jurisdiction and control, and where no other nation's laws are operative.

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[2] Gov't Br. to U.S. Court of Appeals for the District of Columbia Circuit, at 13.

[3] *Id.* at 31.

As to the first point, in the government's view the writ is and historically has been territorially limited, running only to persons situated in lands subject to formal United States sovereignty: "sovereignty, not malleable notions of control or use, is the dispositive factor."[4] The indefinite lease for Guantánamo, executed between the United States and Cuba in 1903, cedes to the United States "complete jurisdiction and control" of the base, until both parties shall agree otherwise, but reserves to Cuba "ultimate sovereignty." The Solicitor General acknowledges that "Cuban courts clearly cannot hear [the detainees'] claims."[5] He nevertheless reasons that, because Guantánamo is ultimately subject to Cuban sovereignty, neither the federal *habeas* statute nor the common law writ known to the Framers and guaranteed under the Constitution is available to non-citizens there.

Secondly, the government asserts that the judiciary has no authority, on *habeas corpus* or otherwise, to review this Executive Branch determination. Whatever rights are possessed by the Guantánamo detainees, argues the Solicitor General, "the scope of those rights [is] to be determined by political and military authorities, *not by the courts*."[6]

The historical evidence set forth below suggests, however, that the common law writ of *habeas corpus*, known to the Framers and incorporated into the Suspension Clause of the Constitution, would have been available to challenge the "enemy" status of individuals detained in a territory, like Guantánamo, that has been firmly under this country's exclusive jurisdiction and control for over a century.[7] Indeed, the vastness of the Great Writ's reach was

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[4] *Id.* at 22; *see also* Gov't Opp. Cert. at 15 (same).

[5] Gov't Br. to D.C. Cir. at 43.

[6] *Id.* at 43-44 (internal quotation marks omitted and emphasis added); *see also* Gov't Opp. Cert. at 14 (classification as "enemy alien" is "a quintessential political question" and courts should "respect the actions of the political branches")

[7] *Amici* take no position on whether the historical evidence suggests that the writ of *habeas corpus* would have been available under the different circumstances presented in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Johnson*, this

not merely understood by 1789, but had been so long recognized that no one could have imagined that matters might be otherwise.[8] This was the understanding of Sir Edward Coke, the great common law justice revered by the Founders, as well as of other leading English jurists. Such historical evidence has long been considered by the Court as important in interpreting the Great Writ's availability and scope as guaranteed by the Suspension Clause and federal *habeas* statutes.[9]

1. Well established principles governed the operation of English law in new territories. These principles increasingly constrained executive authority and helped ensure that no lands under British control, not even lands conquered by force, would exist without law. Some version of *habeas corpus*, including the common law writ familiar to the Founding generation, formed part of the king's justice and the "ancient constitution" that

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Court held that German enemy prisoners detained in Landsberg Prison in Germany, and previously tried, convicted, and sentenced by a military commission in Nanking for offenses committed in China after the unconditional surrender of Germany at the end of World War II, could not obtain *habeas* relief in the federal courts. The nature and scope of U.S. control over Landsberg Prison was different than its century-long total and exclusive control over Guantánamo, as the former involved, *inter alia*, a temporary military occupation and shared control with other nations.

[8] *E.g.*, J.H. Baker, 6 *The Oxford History of the Laws of England* 94 (2003) (from its origins as an assertion of the prerogative of the crown, the writ was employed by courts by the mid sixteenth-century as "an effective means of curbing arbitrary power, whether exercised by ministers of the Crown or by any other person exercising an authority or jurisdiction which deprived a subject of his liberty").

[9] *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 301-05 (2001); *Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring) ("The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted."); *see also Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830) (Marshall, C.J.); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.) ("for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law"); H. Friendly, "Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments," 38 *U. Chi. L. Rev.* 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers. . . .").

accompanied the extension of English law to these lands, and writs were issued by local courts in territories throughout the British empire. It was clear well before 1789 that *habeas corpus* possessed a broad territorial ambit based on its nature as a prerogative writ and a guarantor of individual liberty, and that an English court's determination of whether it could issue the writ beyond the realm turned primarily on the crown's control over the territory and the ability of English judges to enforce the writ, not the particular label ascribed to the territory. The scope of the writ's protections, moreover, enabled even detained "enemy aliens" to challenge the lawfulness of that classification on *habeas*.

2. The history of *habeas corpus* followed a similar path in the American colonies and the early United States. The common law writ was in operation throughout the thirteen American colonies by the time of the Revolution. The Framers, steeped in the common law tradition, viewed *habeas corpus* as a preeminent safeguard of individual liberty and check on arbitrary executive power, and guaranteed the Great Writ's continued availability in the Constitution, subject only to suspension by Congress under narrowly defined circumstances. As in England, the writ's protections were not limited by the nationality of the subject, and did not exclude *habeas* petitions that challenged the threshold question of a detainee's alleged "enemy alien" legal status.

In short, contrary to the government's assertions that formal sovereignty is "the dispositive factor" in determining the availability of the writ, and that "enemy alien" status is determined exclusively by "political and military authorities," the historical evidence indicates that the common law writ of *habeas corpus* secured by the Constitution was available to persons held in executive detention, in lands over which the national government had fully consolidated power and control, and further that the scope of review of the writ included challenges to a prisoner's "enemy alien" classification.

ARGUMENT

I.

THE AVAILABILITY OF THE COMMON LAW WRIT OF *HABEAS CORPUS* IN TERRITORIES THROUGHOUT THE BRITISH EMPIRE

A. *The Operation of English Law Overseas*

Before describing the wide availability of the writ of *habeas corpus* in English-controlled territories, this Part examines the basic principles that ensured no land was without law and that have guided the extension of English law to newly conquered or settled lands since they were first articulated by Chief Justice Coke in *Calvin v. Smith*.[10] There, Coke divided conquered territories into two types – "Christian" and "infidel."[11] Upon conquest, the king could abrogate the native laws of "infidel" lands because they were "not only against Christianity, but against the law of God and nature, contained in the decalogue," and until "certain laws [were] established among them," the king could govern such lands "according to natural equity."[12] In contrast, the laws of a conquered "Christian" people would remain in force until the king, as conqueror, activated English law in the conquered land.[13] Once English law had been made operational, however, no subsequent king could unilaterally alter the law without the consent of

[10] 77 Eng. Rep. 377 (K.B. 1608). *Calvin's Case* was heard before all the common law judges of England in Exchequer Chamber. These principles continued to develop in the centuries that followed. *See generally* E. Brown, *British Statutes in American Law, 1776-1836* (1964).

[11] 77 Eng. Rep. at 397-98.

[12] *Id.* at 398. English courts had cast doubt on this exception for "infidel" lands by the 1770s. *See, e.g., Campbell v. Hall*, 98 Eng. Rep. 1045, 1047-48 (K.B. 1774) ("[T]he absurd exception as to pagans, mentioned in *Calvin's Case*, shows the universality and antiquity of the maxim. For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Crusades.").

[13] *Calvin*, 77 Eng. Rep. at 398.

Parliament.[14] Coke's opinion influenced the extension of English law to new lands, and provided a basis for imposing further constraints on royal power.[15]

While the extension of English statutes enacted after the established date of conquest or settlement required more specific authorization by Parliament, core common law principles became available upon some signal from the king of his intent to activate English law.[16] Under these rules, English common law became operational in places populated by English settlers like the mainland American colonies and the West Indies,[17] as well as in what were essentially military garrisons like Gibraltar, conquered from Spain in the early 1700s.[18]

[14] *Id.*

[15] *See* D. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," 21 *Law & Hist. Rev.* 439, 461 (2003); *see also* 1 W. Blackstone, *Commentaries*, *107 ("[I]n conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.") (citing *Calvin*); M. Hale, *The History of the Common Law of England* 117 (1755) (extension of common English law to Ireland); J. Smith & T. Barnes, *The English Legal System: Carryover to the Colonies* 6-7 (1975) ("Under the concepts of *Calvin's Case*, if the King put into effect the laws of England for the government of a conquered Christian kingdom, no succeeding king could alter them without an act of Parliament.").

[16] *See, e.g., R. v. Vaughan*, 98 Eng. Rep. 308, 311 (K.B. 1769) (English common law extended by crown proclamation).

[17] *See, e.g.*, "Richard West [Counsel to the Board of Trade] on English Common and Statute Law in Settled Colonies" (June 20, 1720), *reprinted in* 2 F. Madden & D. Fieldhouse, *The Classical Period of the First British Empire, 1689-1783*, at 192 (1985); *Anonymous* ("Privy Council Memorandum"), 24 Eng. Rep. 646 (P.C. 1722); A.B. Keith, *Constitutional History of the First British Empire* 186 (1930); V. Newton, *Commonwealth Caribbean Legal Systems: A Study of Small Jurisdictions* 22, 26 (1988) (principles of extension of English law shaped the legal systems of countries throughout the Caribbean).

[18] *See Jephson v. Riera*, 12 Eng. Rep. 598, 606-07 (P.C. 1835) (rights of inhabitants of Gibraltar to be determined according to English law upon its substitution for law of Spain); *see also R. v. Brampton*, 103 Eng. Rep. 782, 785 (K.B. 1808) (Ellenborough, C.J.) (suggesting that English law could govern

In short, no territory under English control remained without the rule of law.[19] And, once English law had been activated, the king could not alter it without legislative consent. Writing on the eve of the American Revolution in *Campbell v. Hall*,[20] Lord Mansfield refused to sustain the Crown's claim that a duty had lawfully been imposed on the export of sugar from Grenada, which had previously been conquered by Britain from France. Mansfield acknowledged the king's power to impose English statutes, but found that prior proclamations extending English law (a right to assembly) prevented subsequent unilateral imposition by the king of a new law (a tax without legislative consent).[21] *Campbell* thus represents the increasing limits courts placed on the royal prerogative to alter an existing system of law even in conquered countries.

Campbell further demonstrates how this framework had come to exist alongside certain overarching legal norms. As Lord Mansfield stated, even within the king's sphere of power as conqueror he could introduce no change "contrary to fundamental principles."[22] Similarly, the following year Mansfield sustained an action by a "native" from the military colony of Minorca against the military governor for false imprisonment and banishment without trial.[23] In rejecting the governor's sweeping assertions of

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action over estate by widow of deceased British Army officer in Santo Domingo, a foreign country occupied by British troops; but concluding that marriage would have been valid under either English or local law).

[19] *Compare Blankard v. Galdy*, 87 Eng. Rep. 356, 361-62 (K.B. 1691) (local laws in Jamaica, a Christian country conquered from Spain, remained in force), *with Calvin*, 77 Eng. Rep. at 398 (once English law extended to Ireland following conquest, it could not be altered by any subsequent king absent consent of Parliament).

[20] 98 Eng. Rep. 1045 (K.B. 1774).

[21] *Id.* at 1050.

[22] *Id.* at 1048. It was, ironically, the violation of such fundamental principles that shortly thereafter caused the Founders to rebel against English rule and, in turn, led them to enact safeguards against the arbitrary exercise of executive power in their own constitution.

[23] *Fabrigas v. Mostyn*, 20 Howell's State Trials 81 (K.B. 1775).

absolute executive power, Mansfield cautioned that "to lay down in an English court of justice such monstrous propositions as that a governor . . . can do what he pleases . . . and to maintain here that every governor in every place can act absolutely; that he may spoil, plunder, affect [the people's] bodies and their liberty, and is accountable to nobody -- is a doctrine not to be maintained; for if he is not accountable in this court, he is accountable nowhere."[24]

Such were the general principles of extension at the Founding. By analogy to the case at bar, the president could initially have carried forward Spanish law in Cuba or altered it by extending U.S. law there after the United States "conquered" Cuba from Spain[25] and was then granted complete control over Guantánamo Bay.[26] There is no question that Spanish law as it existed in 1898 has been fully displaced. Nor can there be any suggestion that Cuban law has operated at Guantánamo since 1903.[27] Instead, U.S. law was long ago activated in Guantánamo, and remains the *only* law operational there, governing both civil[28]

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[24] *Id.* at 231.

[25] The Treaty of Peace concluded between Spain and the United States on December 18, 1898 relinquished Spanish sovereignty over Cuba and allowed for U.S. occupation of the island. *See* Treaty of Peace, Dec. 10, 1898, U.S.-Spain, art. I, 30 Stat. 1754.

[26] In 1902, the United States recognized the independence of Cuba, and in 1903 signed a lease agreement with Cuba giving the U.S. "complete jurisdiction and control over and within" the territory at Guantánamo Bay. *See* Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418. The United States may continue to exercise this total and exclusive control over Guantánamo for as long as it chooses, *see* Treaty between the United States and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866, and has consistently insisted that it may remain there indefinitely under the agreement. *See* G. Neuman, "Anomalous Zones," 48 *Stan. L. Rev.* 1197, 1197-98 (1996).

[27] Gov't Br. to D.C. Circuit at 43 (government acknowledgment that "Cuban courts clearly cannot hear [the detainees'] claims").

[28] *See Huerta v. United* States, 548 F.2d 343, 344, 346 (Ct. Claims) (assuming court may adjudicate breach of contract and takings clause claims by Cuban national for loss of property situated on Guantánamo), *cert. denied.*, 434 U.S. 828 (1977); Neuman, "Anomalous Zones," *supra*, at 1228.

and criminal matters,[29] including offenses committed by non-U.S. nationals.[30] Under the basic principles of extension familiar to the Founding generation, once U.S. law had been activated in Guantánamo, no President could alter those laws without the consent of Congress.

As explained more fully below, the writ of *habeas corpus* was a special case within the main body of English common law and its extension principles. Central authorities in England had long maintained, and settlers in colonial America adamantly demanded, that the operation of English law in new territories necessarily included certain core principles of royal power and the "ancient constitution," including the common law writ of *habeas corpus* known to the Framers and guaranteed by them under the Suspension Clause. The Framers would thus have expected that the extension of U.S. law to a U.S. enclave like Guantánamo would necessarily have meant that *habeas corpus* be available to those detained there.

B. *The Extension of the Common Law Writ of* Habeas Corpus *to Territories Beyond the Realm of England*

From its origins as an expression of royal power to its evolution into the fundamental safeguard of liberty, the writ of *habeas corpus* has long provided the means to test the legality of an individual's detention. First, the principles governing the extension of English law, and the belief that core elements of English justice like the common law writ of *habeas corpus* must be

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[29] *See United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (trial of U.S. citizen for acts done in course of employment on Guantánamo). The extension of U.S. law to Guantánamo was almost immediate. *See, e.g.*, Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. IV, T.S. No. 426 (providing, *inter alia*, that "fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within said areas, taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities").

[30] *See United States v. Lee*, 906 F.2d 117, 117 n.1 (4th Cir. 1990) (trial of Jamaican national for acts committed on Guantánamo).

available in places under English control, led local courts to issue the writ in a wide spectrum of territories, whether dominions, plantations, or even the merchant trading posts originally known as "factories."

Second, the King's Bench in Westminster increasingly asserted its authority to issue writs of *habeas corpus* directly to persons detained in territories overseas, particularly where a territory lacked local courts capable of issuing and enforcing the writ. As a mandatory or prerogative writ,[31] *habeas corpus* has long occupied a unique place in the Anglo-American legal tradition. Distinguishing it from other common law writs, Blackstone described *habeas corpus* as "the great and efficacious writ, in *all* manner of illegal confinement."[32]

1. The Power of Local Courts throughout English-controlled Territories to Issue the Common Law Writ of *Habeas Corpus*

During the 1700s, *habeas corpus* was widely available in overseas territories and local courts possessed the power to issue the writ. For example, the common law writ was confirmed by the crown in instructions to the governors of Barbados, the Bahamas, and St. John in the West Indies, as well as Nova Scotia on the mainland.[33] The common law writ was also available in Jamaica by the eighteenth century.[34] While the crown originally chose to continue local Spanish law in Trinidad following its conquest from Spain, the initial activation of English law in 1830 included the writ of *habeas corpus*.[35]

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[31] Both terms are used to describe *habeas corpus*.

[32] 3 W. Blackstone, *Commentaries* *131 (emphasis added).

[33] Instruction Nos. 464 & 466, *in* 1 *Royal Instructions to British Colonial Governors* 334-38 (L. Labaree ed. 1967) (instructions to Barbados in 1702, Bahamas in 1729, St. John in 1769, and Nova Scotia in 1749).

[34] *See* 2 Madden & Fieldhouse, *supra*, at 450 n.2.

[35] *See* K.W. Patchett, "Reception of Law in the West Indies," 1973 *Jamaica L.J.* 17, 26.

The crown's actions in Quebec on the eve of the American Revolution similarly demonstrate that *habeas corpus* was viewed as so fundamental that it should operate even in a conquered land in which other core elements of the ancient constitution -- common law property tenures and a local assembly -- were avoided (the former at least for French settlers).[36] The crown instructed the Quebec governor to allow the common law writ of *habeas corpus* to issue from Quebec's courts because it represented such a fundamental principle of English law.[37]

The writ was even available in territories held by merchant companies like the British East India Company pursuant to a grant of authority from the English crown. Initially established in the late seventeenth century as "factories" or trading posts along the coast of India, these companies gradually expanded their presence and control through fortified settlements.[38] By 1765, the East India Company had become a substantial military power, with *de facto* control over large territories beyond its coastal factories.[39] In 1773, English law generally became operational in the East India

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[36] *See* Quebec Act of 1774, 14 Geo. 3, c. 83, art. 12 (describing non-elective legislative council); *id.* arts. 3 & 10 (continuing French land tenure law); *id.* art. 9 (addressing British land grants).

[37] *See* Instruction No. 467, *in* 1 *Royal Instructions to British Colonial Governors*, *supra*, at 338 ("Security to personal liberty is a fundamental principle of justice in all free government and the making due provision for that purpose is an object the legislature of Quebec ought never to lose sight of; nor can they follow a better example than that which the common law of this kingdom hath set in the provision made for a writ of habeas corpus, which is the right of every British subject in this kingdom."); *see also* D. Clark & G. McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* 20 & n. 90 (2000) (common law writ of *habeas corpus* available in Quebec, even though writ not specifically named by statute).

[38] *See generally, e.g.*, A.B. Keith, *A Constitutional History of India, 1600-1935*, at 24-25 (1969).

[39] P.J. Marshall, "The British in Asia: Trade to Dominion, 1700-1765," *in* 2 *The Oxford History of the British Empire* 487, 503 (P.J. Marshall ed. 1998) (East India Company became "outright ruler" of limited areas in the province of Bengal).

Company's territories,[40] and a supreme court was established at Calcutta.[41] By 1775, judges were issuing writs of *habeas corpus*,[42] without any explicit statutory authorization.[43] Writs were issued for the benefit not only of British subjects but non-subjects or "natives" as well.[44] Judges issued writs of *habeas corpus* to prevent imprisonment without trial resulting from the arbitrary exercise of power,[45] and custodians who disobeyed the writ's commands could be held in contempt.[46] The Chief Justice understood his authority to issue writs of *habeas corpus* to be

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[40] *E.g.*, L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, at 136 (2002).

[41] Regulating Act of 1773, 13 Geo. 3. c. 63, § 13.

[42] *E.g.*, N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* 81 (2003) (first writ issued in 1775 on behalf of Kemaluddin Khan, also known as Abdul Muhammad Kamal, a revenue collector detained by East India Company over issue of late payments); T. Curley, *Sir Robert Chambers: Law, Literature, and Empire in the Age of Johnson* 241 (1998) (second writ issued in Kamal case by Judge Chambers to ensure rule of law after faulty return to first writ); *see also R. v. Ramgovind Mitter* (Sup. Ct., Calcutta 1781) (opinion of Chambers, J.), 1 *The Indian Decisions* 1008 (T.A. Venkasawmy Row ed. 1911) (common law power of individual judges to issue writs of *habeas corpus*); *R. v. Hastings* (Sup. Ct., Calcutta 1775) (opinion of Impey, C.J.), 1 *The Indian Decisions*, *supra*, at 1005, 1007 (same).

[43] The Regulating Act of 1773 did not specifically authorize the supreme court to issue writs of *habeas corpus*. *See* 13 Geo. 3. c. 63, §§ 13-14 ; *see also* Clark & McCoy, *supra*, at 21 n.96.

[44] *E.g.*, B.N. Pandey, *The Introduction of English Law into India* 151 (1967) (writ issued in 1777 on behalf of Indian arrested and confined without trial by local criminal court in Bengal, outside Calcutta).

[45] *Id.* at 17.

[46] *See, e.g.*, *Ramgovind Mitter* (opinion of Hyde, J.), 1 *The Indian Decisions*, *supra*, at 1009 (routine practice to enforce custodian's non-return to writ of *habeas corpus*); *In re Coza Zachariah Khan* (Sup. Ct., Calcutta 1779), *reported in* 1 W.H. Morley, *An Analytical Digest of all The Reported Cases Decided in the Supreme Court of Judicature in India* 277 (1850) ("The Judge who issued the writ [of *habeas corpus*] may grant an attachment for disobedience . . . either in term or in vacation."); Pandey, *supra*, at 233 ("[Judges] challenged the power of the [East India] Company's servants to imprison a person indefinitely without bail or trial . . . . [by] issuing writs of *Habeas Corpus* and holding a punishment for contempt of Court to those who disregarded the writs.").

derived from the principle, articulated by Blackstone, that this high prerogative writ extended to all parts of the king's dominions to test the legality of imprisonment.[47] This exercise of *habeas corpus* jurisdiction became an instrument for the extension of "fundamental principles" of English law and justice to these British-controlled territories in India.[48]

Importantly, judicial power to issue writs of *habeas corpus* in India did *not* turn on the existence of formal sovereignty. To the contrary, Britain intentionally delayed assertions of formal sovereignty over the range of territories controlled by the East India Company until 1813[49] – nearly *four decades* after judges had begun issuing writs of habeas corpus on behalf of individuals detained by Company officials in those same lands.[50] Moreover,

[47] *See* Hussain, *supra*, at 81 & 164 n.36 (citing Chief Justice Impey to the Lord Chancellor, "Observations on the Administration of Justice in Bengal" (Sept. 20, 1776) (British Museum Add. MS. 16,265, fol. 235)).

[48] *Id.* at 80 (internal quotation marks omitted); Pandey, *supra*, at 17 (court's issuance of writs of *habeas corpus* reduced arbitrary exercise of power by company officials); *see also* Curley, *supra*, at 593 n.57 (by 1775, support of first governor-general of India, Warren Hastings, for issuing writs of *habeas corpus* where custodian was under authority of East India Company).

[49] 4 *The Cambridge History of the British Empire* 595 (Dodwell, H.H. ed. 1929); *see also id.* at 605 ("Down to [1813] the British assertion of sovereignty within the Company's possessions had been spasmodic and incomplete."); *see* Act of 1813, 53 Geo. 3, c. 155.

[50] Even after Parliament began to narrow the Calcutta supreme court's *habeas* jurisdiction in 1781, *see, e.g.,* Act of 1781, 21 Geo. 3, c. 70, § 8 (curtailing supreme court's jurisdiction over matters concerning revenue collection), the court continued to issue writs of *habeas corpus*. *See, e.g., In re Muddoosooden Sandell* (Sup. Ct., Calcutta 1815), *reported in* 2 Morley, *supra*, at 29; *Rajah Mohinder Deb Rai v. Ramcanai Cur.* (Sup. Ct., Calcutta 1794), *reported in* 1 Morley, *supra*, at 277 (issuing writ and discharging Indian prisoner detained by order of provincial court, upon request of defendant in suit before Calcutta supreme court after prisoner had given evidence supporting plaintiffs in said suit). A separate supreme court established at Madras in 1801, *see* M.P. Jain, *Outlines of Indian Legal History* 125 (1952), likewise continued to issue writs of *habeas corpus*. *See, e.g., R. v. Nagapen* (Sup. Ct., Madras 1814), *reported in* 1 Morley, *supra*, at 278 (writ issued on behalf of mother to obtain possession of her illegitimate infant unlawfully in putative father's custody); *R. v. Monisse*, (Sup. Ct., Madras 1810), *reported in* 1 Morley, *supra*, at 278.

the Mughal emperor had continued to assert ultimate sovereignty,[51] and British authorities in Britain and India had continued to avoid claims of formal sovereignty,[52] long after English law had been made operational and local judges had started issuing writs of *habeas corpus* on behalf of those, for instance, situated outside Calcutta.[53] Indeed, during the decades after the first writ was granted in India, "the relations between the [East India] Company's government in [Bengal] and the Moghul emperor" remained one, respectively, of "the *de facto* and the *de jure* wielders of Indian dominion."[54]

In sum, to crown officials in both the center and periphery, *habeas corpus*, the preeminent symbol of royal power and safeguard against arbitrary imprisonment, signified the rule of law and English justice. Accordingly, local courts issued some form of *habeas corpus*, even on behalf of non-subjects, in English-controlled territories over which the crown had not formally asserted sovereignty.

[51] 4 *The Cambridge History of the British Empire* at 592 ("formal sovereignty" lay with the Moghul emperor, but existing alongside the emperor and his local governors was the East India Company, which "possessed the sole military force" in the region).

[52] *Id.*

[53] *See, e.g., Rajah Mohinder, supra, reported in* 1 Morley, *supra*, at 277; Pandey, *supra*, at 151 (writ issued in 1777 on behalf of person detained by officers of Dacca Council, provincial council in east Bengal composed of British servants of East India Company); *id.* at 140 (writ issued in 1777 on behalf of person detained by head of local government and military at provincial city of Murshidabad); Curley, *supra*, at 245 ("The Court would continue to honor applications for habeas corpus from anybody . . . who was imprisoned by a company servant outside Calcutta.") (internal quotation marks omitted); *see also Monisse, supra, reported in* 1 Morley, *supra*, at 278 (issuing writ beyond Madras) ("A *habeas corpus* will lie to release persons improperly deprived of their liberty by the Nabob of the Carnatic (an independent native prince).").

[54] 4 *The Cambridge History of the British Empire, supra*, at 593; *see also* H.V. Bowen, "British India, 1765-1813: The Metropolitan Context," *in* 2 *The Oxford History of the British Empire, supra*, at 530, 547 (Act of 1813 and its assertion of "'undoubted sovereignty' over all the Company's territories . . . . add[ed] the *de jure* sovereignty of the Crown to the *de facto* sovereignty that had long been exercised by the Company.") (quoting 53 Geo. 3, c. 155).

2. The Power of Central English Courts to Issue the Common Law Writ of *Habeas Corpus* to Territories Overseas

As a mandatory writ that "commands the production of [an aggrieved subject], and inquires after the cause of his imprisonment,"[55] *habeas corpus* has always had a broad territorial reach. Cases dating from as early as the seventeenth century demonstrate that the common law writ ran from central English courts not only to so-called "exempt" jurisdictions within the realm,[56] where the ordinary writs used in civil suits did not run,[57]

[55] John Eardley Wilmot, *Opinion on the Writ of Habeas Corpus,* 97 Eng. Rep. 29, 36 (H.L. 1758); *see id.* at 44; *Anonymous*, 86 Eng. Rep. 230 (K.B. 1681); Rolle, 2 *Un Abridgment des Plusiers Cases et Resolutions del Common Ley* 69 (1668) ("[T]he king *must have an account* made to him of the liberty of subjects and of the restraint of them.") (emphasis added); *see also R. v. Patrick*, 84 Eng. Rep. 103, 107 (K.B. 1667) ("mandatory writ [of *habeas corpus*] must be obeyed").

[56] *See, e.g., Alder v. Puisy*, 89 Eng. Rep. 10 (K.B. 1671) (writ issued to Dover, formerly a Cinque Port town); *Bourn's Case*, 79 Eng. Rep. 465, 466 (K.B. 1619) (same); *Harrison's Case, sub nom. Jobson's Case*, Latch 160, 82 Eng. Rep. 325 (K.B. 1626) (writ issued to Durham, formerly a County Palatine; writs previously issued to Calais and Bordeaux as early as fourteenth century); *Harrison's Case*, Harvard L. Sch. MS 5016, fol. 80 (Commonplace Book of Thomas Twisden) (noting Judge Dodderidge's reference to writs of *habeas corpus* issued to Berwick by early 1600s); *Sir Matthew Hale's The Prerogative of the King* 207 (The Publications of the Selden Society, vol. 92) (Yale, D.E.C., ed., London: Bernard Quaritch, 1975) (broad reach of the writ to such exempt jurisdictions "hath been often resolved, partly in respect of the interest the king hath in his subject, partly in respect there is no other means to examine whether his commitment be legal").

[57] *E.g.*, 3 W. Blackstone, *Commentaries* *79 ("[A]ll prerogative writs [including *habeas corpus*] may issue . . . to all these exempt jurisdictions; because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king.") (footnotes omitted); *see also* R.J. Sharpe, *The Law of Habeas Corpus* 183 (1976) ("The privilege of [old exempt] jurisdictions . . . to determine disputes between parties within their jurisdiction . . . could not prevent the royal prerogative calling for an account of the imprisonment of a subject from having full force.").

but also to dominions beyond the realm.[58] Refusing to accept any claims of jurisdictional immunity, English courts routinely threatened to sanction,[59] and on occasion imprisoned,[60] custodians for failing to make a return to the writ. Courts were concerned with enforcing the writ to prevent "a failure of justice,"[61] not with parsing the formal legal status of the territory where an individual was detained.

The principles that had long governed the Great Writ's broad territorial reach were forcefully articulated by Lord Mansfield in *R. v. Cowle* in 1759.[62] Mansfield rejected the assertion that a common law writ of *habeas corpus* would not run to the town and borough of Berwick, a territory that had undergone a "metamorphosis" from Scottish to English control, becoming a

[58] *See, e.g., R. v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (writ issued to Channel Island of Jersey on behalf of individual committed on "suspicion of treason"); *R. v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (writ issued to Jersey); Hale, *The History of the Common Law*, *supra*, at 120 (writ issues to Channel Islands because "the King may demand, and must have an Account of the Cause of any of his Subjects Loss of Liberty"); *see also Bourn's Case*, 79 Eng. Rep. at 466 (reported more fully at Lincoln's Inn, MS Maynard 22, fol. 406v.) (writ issued to Calais when formerly subject to king of England); M. Bacon, *A New Abridgement of the Law*, Tit. Habeas Corpus (B) (7th ed. 1832) (same); 3 W. Blackstone, *Commentaries* *131 ("high prerogative writ" of *habeas corpus* "run[s] into all parts of the king's dominions; for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, *wherever that restraint may be inflicted*") (footnotes omitted) (emphasis added).

[59] *E.g., Pettit's Case*, PRO, KB21/12, fols. 102v. & 107 (K.B. 1638) (issuing 200£ subpoena to Mayor of Sandwich in Cinque Ports to compel return to writ); *see also Brearley's Case*, PRO, KB21/2, fols. 84v, 87 & 95 (K.B. 1600-1601) (issuing subpoena to compel return to writ by mayor and corporation of Berwick).

[60] *Witherley's Case*, Harvard L. Sch. MS 118, fol. 57 and MS 1180, fol. 68v; KB21/2, fol. 166v. and KB21/3, fols. 24-32v. (K.B. 1605) (fining and imprisoning jailor for non-return of writ issued to Marches of Wales).

[61] *Rickaby's Case*, Harvard L. Sch. MS 1166, fol. 273 (K.B. 1641-1642) (non-return from Palatine of Durham not permitted); *see also* Wilmot, *Opinion on the Writ of Habeas Corpus, supra*, 97 Eng. Rep. at 42 (enforcement of common law writ by attachment).

[62] 97 Eng. Rep. 587 (K.B. 1759).

corporate dominion of England[63] even though "no part of the realm of England."[64] He concluded that there was "no doubt as to the power [of the King's Bench]" to issue writs of *habeas corpus* "where the place is *under the subjection* of the Crown of England."[65] Acknowledging the longstanding principle that a writ of *habeas corpus* would not run to Scotland,[66] Lord Mansfield nevertheless maintained that the writ would run to territories beyond the realm, including to the Isle of Man, the "plantations" (the mainland American colonies and the West Indies), and the Channel Islands of Jersey and Guernsey, and observed that the writ had previously run to the conquered territory of Calais.[67] The decision to issue the writ turned principally on whether the court could "judge of the cause" or "give relief upon it."[68] In such instances, *habeas corpus* was "the properest and most effectual remedy."[69]

Cowle thus made explicit that the writ's extension beyond the realm turned on the degree of the crown's control over the particular territory and its power to secure obedience to the writ's command. As there were no local courts capable of issuing *habeas corpus* in Berwick, the refusal of the King's Bench to extend the writ there would have led to the perverse conclusion that a territory

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[63] *Id.* at 599.

[64] *Id.* at 598.

[65] *Id.* at 599 (emphasis added).

[66] *Id.* at 600. Although the thrones of England and Scotland had been joined since 1603 and the countries joined politically under the Act of Union of 1707, Scotland retained a high degree of independence, including its own legal and religious systems, and had a writ analogous to *habeas corpus*. *See generally* "Note on the Power of the English Courts to Issue the Writ of Habeas Corpus," 8 *Jurid. Rev.* 157, 158 (1896) (monarchies of England and Scotland united, but Scotland, formerly an independent nation, not "subject to the crown of England").

[67] *Cowle*, 97 Eng. Rep. at 600.

[68] *Id.*

[69] *Id.*

under English control was entirely without the protections of the Great Writ.[70]

In sum, the writ of *habeas corpus*, in one form or another, became operational once the crown had consolidated its control over a territory.[71] To claim that *habeas corpus* does not extend to a territory over which United States has long exercised complete control and jurisdiction but lacks "ultimate sovereignty" is to turn the common law understanding of the Great Writ on its head: "sovereignty" itself was increasingly understood as existing precisely where the king's mandatory writs could be issued and enforced. *Amici* are unaware of any case before 1789 in which the common law writ of *habeas corpus* was held *not* to extend to territory under the crown's exclusive control and jurisdiction. To the contrary, English courts historically resolved any questions about the writ's territorial reach in favor of its availability, and it was only a legislative act explicitly curtailing the writ[72] that could place the executive detention of those imprisoned on territory within the crown's total and exclusive control beyond all *habeas corpus* review.

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[70] *Id.* at 598 ("The people of Berwick have not jura regalia . . . [and] have no sovereign Courts of the King within themselves . . . ."); *see also Ex parte Anderson*, 121 Eng. Rep. 525, 526-27 (Q.B. 1861) (Cockburn, C.J.) ("At the time of the decision in *Rex v. Cowle* . . . Berwick was not subject to the laws of Scotland. There was, consequently, no superior Court with power to control proceedings instituted there, unless the superior Courts of Westminster had jurisdiction to do so.") (internal citation omitted).

[71] These conclusions regarding the writ's territorial ambit fully support the conclusion of the Brief for the Commonwealth Lawyers Association as *Amicus Curiae* in Support of Petitioners, at 2-3.

[72] *See generally* Sharpe, *supra*, at 91-92 (acts of Parliament during seventeenth and eighteenth centuries suspending writ for those accused or suspected of treason and similar offenses).

C. *The Ability of Alleged "Enemy Aliens" to Obtain Review of their Classification by Writ of* Habeas Corpus

The writ of *habeas corpus* has historically served that most basic function of ensuring the committing authority has jurisdiction over the person detained.[73] Where an individual is imprisoned pursuant to executive rather than judicial command, the writ's protections have been at their strongest.[74] Indeed, the writ of *habeas corpus* has traditionally provided a remedy to executive detention when there otherwise would have been none. [75]

At common law, the writ's protections encompassed both aliens and citizens (or subjects),[76] and even the former were able to challenge the jurisdictional fact of their "enemy" status on *habeas*.[77] In *R. v. Schiever*,[78] for example, the court adjudicated the *habeas* petition of an alien from a neutral nation (Sweden), who had been captured aboard an enemy French privateer during a

[73] *See, generally, e.g.*, W. Church, *A Treatise on the Writ of Habeas Corpus*, § 222, at 311 (2d ed. 1893) ("The question of jurisdiction, in the commitment of persons for either civil or criminal matters is always open and may be inquired into upon proceedings by habeas corpus.").

[74] *St. Cyr*, 533 U.S. at 301.

[75] *See, e.g., Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (*habeas corpus* challenging sailor's impressment into the navy); *R. v. White*, 20 Howell's State Trials 1376, 1377 (K.B. 1746) (granting *habeas corpus* relief to impressed seaman who had "no other remedy"); *see also* A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 219 (8th ed. 1927) (*habeas* review of impressment of sailors by the Admiralty reflected a "very notorious instance of judicial authority in matters most nearly concerning the executive").

[76] *See Somerset's Case*, 20 Howell's State Trials 1, 79-82 (K.B. 1772) (discharging African slave, purchased in Virginia and detained on ship prepared to depart for Jamaica); *see also Case of the Hottentot Venus*, 104 Eng. Rep. 344, 344 (K.B. 1810) (reviewing *habeas* petition of "female native of South Africa").

[77] *See generally* Sharpe, *supra*, at 113-14.

[78] 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759). A second report of *R. v. Schiever* was published anonymously in Kenyon's Reports. *See* 2 Ken. v. 473, 96 Eng. Rep. 1249 (K.B. 1759).

war between England and France.[79] Although the court ultimately denied relief, it first reviewed the petition to determine the petitioner's legal status, concluding that he was in fact a prisoner of war and therefore lawfully detained.[80]

In the *Three Spanish Sailors' Case*,[81] the prisoners had been seized from a Spanish privateer and, after being carried to Jamaica, persuaded to enter a merchant vessel on promise of wages and immediate release upon arrival in England, in exchange for English prisoners. Once in England, however, the ship's captain refused to pay their wages or release them, instead turning them over to an English warship as prisoners of war. Although the court refused to discharge the prisoners based on what it acknowledged was the captain's misconduct, it did so only after noting that the prisoners, "upon their own showing, are alien enemies and prisoners of war, and therefore not entitled to . . . be set at liberty on a habeas corpus."[82]

Even outside the *habeas* context, English courts consistently determined the threshold question of an individual's "enemy alien" status before denying him access to the courts on that basis. *Sylvester's Case*[83] for example, demonstrates that even though enemy aliens were generally barred from suit, courts would review an assertion by a plaintiff that he did not fall within that category.[84] In *Sparenburgh v. Bannatyne*[85] the court engaged in an extensive analysis to adjudicate whether a native of a neutral nation captured amid hostilities on board the ship of an enemy nation was in fact an "alien enemy," and therefore barred from

[79] 97 Eng. Rep. at 551.

[80] *Id.* at 552.

[81] 96 Eng. Rep. 775 (C.P. 1779).

[82] *Id.* at 776.

[83] 87 Eng. Rep. 1157 (K.B. 1703).

[84] *Id.* (question whether alleged enemy alien has Queen's protection and thus can bring suit is reviewable if pled).

[85] 126 Eng. Rep. 837 (C.P. 1797).

bringing suit.[86] In framing the issue, Chief Justice Eyre stated that threshold questions of "enemy" status are always reviewable: "The question is [w]hether . . . the Plaintiff is to be considered as an alien enemy . . . . *If* he must be so considered, I take it to be a necessary consequence that this action must fail."[87] Cases involving the right of enemy aliens to bring suit further underscore the principle that has long governed the Great Writ's operation: courts will exercise review of the threshold question of an individual's "enemy" status before foreclosing all consideration of the merits of his claim.

II.

THE AVAILABILITY OF *HABEAS CORPUS* IN COLONIAL AMERICA AND THE WRIT'S INCORPORATION INTO THE SUSPENSION CLAUSE

A. *The Availability of* Habeas Corpus *in Colonial America and under the U.S. Constitution*

Crown officials increasingly authorized and sanctioned the use of *habeas corpus* in the American colonies,[88] and the colonists themselves demanded the writ's protections against the arbitrary exercise of executive power. Although the procedural reforms provided by the Habeas Corpus Act of 1679[89] were not explicitly

[86] *Id.* at 840-41 (opinion of Eyre, C.J.).

[87] *Id.* at 840 (emphasis added). Chief Justice Eyre acknowledged that the plaintiff, a neutral by birth, was properly characterized as an "alien enemy" when captured, based upon his seizure on board an enemy ship amid actual hostilities, but nonetheless concluded that this status was "temporary" and that the plaintiff had earned the right to be removed from it based on his subsequent conduct. *Id.* at 840-41.

[88] N. Cantor, "The Writ of Habeas Corpus: Early American Origins and Development," *in Freedom and Reform: Essays in Honor of Henry Steele Commager* 55, 69 (H. Hyman & L. Levy eds. 1967).

[89] 31 Car. 2, c. 2. The 1679 act remedied certain procedural flaws in the common law writ, for example, by mandating that a return be made within a date certain, *id.* § 2, and imposing sanctions on the custodian for his failure to do so. *Id.* § 5. The act did not apply to non-criminal detention, which remained

extended to all the colonies,[90] the common law writ remained widely available during the colonial period and was operating in all thirteen British colonies that rebelled in 1776.[91] In practice, moreover, judges employed the procedures of the 1679 act "as a matter of course."[92] When local courts denied relief against crown officials, they did so on the merits, and there was no question that the common law writ was generally available to those who sought it.[93]

The Framers viewed the writ of *habeas corpus* as a fundamental safeguard in their new republic, just as it had been a

subject to challenge by the common law writ in both America and England. *See generally, e.g.*, 6 *Encyclopedia of the Laws of England* 132 (A.W. Renton ed. 1898) ("[T]he Habeas Corpus Act, 1679, applies only to cases of detention or imprisonment for criminal or supposed criminal offences . . . without in any way infringing on the common law jurisdiction of the Courts or judges.").

[90] W. Duker, *A Constitutional History of Habeas Corpus* 115 (1980) (by American Revolution, procedural reforms of 1679 act had been made available in Virginia, North Carolina, South Carolina, and Georgia).

[91] *See, e.g.*, Duker, supra, at 115; A.H. Carpenter, "Habeas Corpus in the Colonies," 8 *Am. Hist. Rev.* 18, 21, 26 (1902); *see also* Duker, *supra*, at 107-08 (failed attempt to establish *habeas corpus* statute in Maryland, but continued availability of common law writ); *id.* at 102 (same in Massachusetts); Keith, *Constitutional History of the First British Empire*, *supra*, at 184-85 (English law regulating relations between crown and subject, including "the right to freedom from arbitrary imprisonment, and its enforcement by the writ of Habeas Corpus," insisted upon by colonists, was available through common law writ).

[92] Z. Chafee, Jr., "The Most Important Human Right in the Constitution," 32 *B.U.L. Rev.* 143, 146 (1952).

[93] *See, e.g.*, E. Washburn, *Sketches of the Judicial History of Massachusetts* 105-06 (1840) (denying *habeas* relief in 1687 to Reverend John Wise and other Ipswich residents accused of "contempts and high misdemeanor" for refusing to pay tax without local consent and ordering prisoners to stand trial) (internal quotation marks omitted); Carpenter, *supra*, at 22 (although writ was "arbitrarily" refused to Reverend Wise, there was "nothing in the incident . . . to indicate that that there was anything new in the asking for such a writ"); *see also* J. Oldham & M. Wishnie, "*The Historical Scope of Habeas Corpus and* INS v. St. Cyr," *16 Geo. Immig. L.J.* 485, 496-99 (2002) (debate over fate of Acadian refugees expelled from France in 1750s and detained by colonial authorities in South Carolina suggests writ's availability).

core liberty available in other parts of the British empire. That *habeas corpus* was the only common law process explicitly incorporated into the Constitution demonstrates the degree to which it was operational in the colonies and the high esteem in which it was held.[94] The limited discussion of the writ at the Constitutional Convention of 1787 and during the ratification debates reflected a broad consensus about the writ's important place in the Constitution.[95] Indeed, to the extent there was any debate among the Framers, it was over what conditions, if any, could ever justify the suspension of *habeas corpus* by Congress.[96]

B. *The Ability of Alleged "Enemy Aliens" to Obtain Review of their Classification by Writ of* Habeas Corpus *in the United States*

Consistent with the English practice noted above, non-citizens in the Founding era enjoyed the protections of *habeas corpus* under U.S. law.[97] The writ, moreover, was available to individuals detained by the executive on even the most serious

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[94] Cantor, *supra*, at 55, 74; *see also The Federalist* 84, at 511 (Alexander Hamilton) (C. Rossiter ed., 1961) (writ of *habeas corpus* is among the "greate[st] securities to liberty and republicanism").

[95] *See, e.g.*, F. Paschal, "The Constitution and Habeas Corpus," 1970 *Duke L.J.* 605, 608 ("[I]n the Philadelphia Convention and in the struggle for ratification, there was never the slightest objection to according a special preeminence to the Great Writ.").

[96] *Compare* 2 *The Records of the Federal Convention of 1787*, at 438 (M. Farrand ed. 1966) (support for "securing the benefit of the Habeas corpus in the most ample manner" and for not permitting its suspension except "on the most urgent occasions, and then only for a limited time") (proposal of Charles Pinckney) (internal quotation marks omitted), *with id.* (support "for declaring the Habeas Corpus inviolable") (proposal of John Rutledge).

[97] *See, e.g.*, *United States v. Villato*, 28 F. Cas. 377, 378-79 (Cir. Ct. D. Pa. 1797) (releasing non-citizen charged with treason); *Ex parte D'Olivera*, 7 F. Cas. 853, 854 (Cir. Ct. D. Mass. 1813) (Story, J., on circuit) (releasing Portuguese sailors arrested as alleged deserters); *Wilson v. Izard*, 30 F. Cas. 131, 131-32 (Cir. Ct. D. N.Y. 1815) (adjudicating *habeas* petition by British enlistees who claimed, *inter alia*, that as "alien enemies" they were ineligible to serve in military).

charges,[98] including those confined in military custody who challenged the military's lack of jurisdiction over them.[99]

Similarly, alleged "enemy aliens" have been able to seek review of their legal status on *habeas corpus*. Early on, courts adjudicated *habeas* petitions challenging detention under the Alien Enemies Act of 1798,[100] which authorized the president to detain alien enemies in time of war. In *Lockington's Case*,[101] for instance, a majority of the judges of the Pennsylvania Supreme Court held that a British citizen detained during the War of 1812 could challenge the legality of his detention on *habeas corpus* and, reaching the merits, remanded him to custody.[102] While the third justice refused to reach the merits, he nonetheless recognized that the prisoner could still have challenged his status as an alien

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[98] *Bollman*, 8 U.S. at 135 (discharging prisoners committed for treason); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 17-18 (1795) (bailing prisoner accused of treason); *Villato*, 28 F. Cas. at 378-79 (discharging prisoner accused of treason).

[99] *See, e.g.*, *In re Stacy*, 10 Johns. 328, 333-34 (N.Y. 1813) (Kent, C.J.) (discharging petitioner who claimed that, as private citizen, military lacked jurisdiction to try him for treason); *see also United States v. Bainbridge*, 24 F. Cas. 946, 951-52 (Cir. Ct. D. Mass. 1816) (Story, J., on circuit) (review on *habeas* of legality of enlistment of minor); *Commonwealth v. Cushing*, 11 Mass. 67, 71 (Mass. 1814) (same); *Commonwealth v. Harrison*, 11 Mass. 63, 66 (Mass. 1814) (discharging Russian minor over whom army lacked lawful custody); E. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 27-28 & 165 n.55 (2001) (citing manuscript reports of federal *habeas* cases reviewing legality of military enlistments during War of 1812); W. Nelson, "The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws," *in Law in Colonial Massachusetts, 1630-1800*, at 419, 457 (1984) (discussing review of same by state courts on common law *habeas* and noting continued use of common law writ "to provide relief against abuses of power by government officials").

[100] Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577.

[101] Bright. (N.P.) 269 (Pa. 1813).

[102] *Id.* at 283 (Tilghman, C.J.); *id.* at 301 (conclusion at end of report). Although the petitions were brought under state law, they demonstrate the court's general understanding of *habeas corpus* law. *See* G. Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens," 98 *Colum. L. Rev.* 961, 993 (1998).

enemy on *habeas*,[103] which the prisoner had not done, instead admitting that he was an alien enemy.[104] *Lockington* also contains a reference to a decision of Chief Justice Marshall on circuit, releasing an alleged enemy alien on *habeas* based on defects in the marshal's order.[105] In another case, a prisoner was discharged based on his showing that he was a citizen of the United States (though a native of Ireland), and thus not an enemy alien.[106]

Finally, consistent with English traditions, early American courts reviewed "enemy alien" classifications in non-*habeas* cases as well. Judicial determinations of an individual's alleged enemy alien status occurred, for example, in property and debt actions after the Revolutionary War,[107] and in similar disputes following the commencement of the War of 1812.[108]

In sum, the historical evidence is not consistent with the government's claim that the writ of *habeas corpus* guaranteed by the Constitution is unavailable to test even the classification as "alien enemies" of those detained at Guantánamo. Guantánamo

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[103] Bright. (N.P.) at 298-99 (Brackenridge, J.) ("I do not see that any *habeas corpus* can issue, *unless* the applicant can make an affidavit in the first instance, that he is not an alien enemy, or, in other words, a British subject, [while the war was raging] with that nation.") (second emphasis added).

[104] *Id.* at 298 ("admission by the applicant" that he is "an alien enemy").

[105] *Id.* at 296-97 (describing the case, as read from "a gazette"). The case is unreported, and has not been found in the files of the circuit court, though it is possible that a newspaper account still exists. Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens," *supra*, at 994.

[106] *Laverty v. Duplessis*, 3 Mart. (o.s.) 42, 1813 WL 757, at *1 (La. 1813).

[107] *See, e.g., Executors of Cruden v. Neale*, 2 N.C. (1 Hayw.) 338, 1796 WL 273, at *2-3 (N.C. Super. L. & Eq. 1796) (man who left North Carolina and joined British during Revolutionary War may nevertheless sue on debt); *Bayard v. Singleton*, 1 N.C. 5, 1787 WL 6, at *3-4 (N.C. Super. L. & Eq. 1787) (in ejectment action, determining "enemy alien" status of plaintiff's father).

[108] *See, e.g., Clarke v. Morey*, 10 Johns. 69 (N.Y. 1813) (Kent, C.J.) (in assumpsit action, relying on *Sparenburgh v. Bannatyne* and *Sylvester's Case*, *supra*, as well as international law, in analyzing and rejecting defendant's claim that plaintiff was "alien enemy" and thus barred from suit).

lies a mere 90 miles from the United States and has been subject to the exclusive control and jurisdiction of the United States for the past century. No other law but U.S. law operates there. The historical evidence suggests instead that the denial of all *habeas corpus* review in such a situation would contravene the fundamental principles that have governed the availability and operation of the Great Writ since well before the United States Constitution was adopted.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court exercise jurisdiction over the *habeas corpus* petitions.

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